IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.793 OF 2007
IN
NOTICE OF MOTION NO.2006 OF 2006
IN
L.C. SUIT NO.2246 OF 2006

1. Panchsheel Residency Co-op.
   Hsg. Soceity Ltd. .. Appellant
   (Orig.Plaintiff)

Versus

1. Conwood Agencies Pvt. Ltd.
2. Sai Constructions & Developers
3. Municipal Corporation for Gr.Mumbai
4. Safalya Co-operative Housing Ltd.
5. Nisarg Co-op. Hsg Soc. Ltd... Respondents
   (Orig.Defendants)

Shri P.K.Dhakephalkar i/b. Shri P.M.Shah, for the Appellant
Shri M.S.Mhambrey for the Respondent No.1
Shri Vijay Gharat,for the Respondent No.4

CORAM : S.R. SATHE,J.
DATED : 23/10/2007

ORAL ORDER :-

1. The Appellant-original Plaintiff in Long Cause Suit No.2246 of 2006 has preferred this appeal against the order passed in Notice of Motion No.2006 of 2006 by the Judge, City Civil Court Greater Mumbai whereby the Plaintiff's application for temporary injunction was partly allowed and defendant No.3 Municipal Corporation of Greater Mumbai (hereinafter referred to as MCGB) was

directed to maintain status-quo in respect of the existing wall of 156 sq.ft. approximately in length and approximately 7 ft. in hight situated at Panchsheel Residency Co-operative Housing Society, Second 6, Mahavir Nagar, Kandivali, Mumbai-67 till the disposal of the suit. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiffs' and 'defendants'.

2. The brief facts giving rise to this appeal are as under :-

The Plaintiff is registered Co-operative Housing Society. The defendant Nos. 1 and 2 are promoters and developers of Plaintiff-society. The defendant Nos.4 and 5 are also Co-operative Housing Societies of which promoters and developers are defendant Nos.1 and 2. The defendant No.3 is a statutory body of Bombay Municipal Corporation.

3. The defendant No.1 took the property bearing Survey No.163, CTS NO.128-A/1/1 and 2, CTS No.128/A-2 to 91, CTS No.128/B (part) admeasuring about 4,81,356.68 sq.meters from one Anthony Parera for

development. The defendant No.1 entered into an agreement with defendant No.2 for construction and development of the said property. According to Plaintiff, as per agreement dated 30/05/2000 and modified agreement dated 15/01/2001 the defendant No.2 was allowed to utilize and consume FSI of 68,408 sq.ft of built up area on the portion of the land admeasuring 4154 sq.meters on certain terms and conditions. The defendant No.2 entered into an agreement with the flat purchasers of 'A' and 'B' Wing of Plaintiff-Society and the relationship between Plaintiff-Society and defendant Nos.1 and 2 is governed by the provisions of Maharashtra Ownership Flat Act-1963 (MOFA, 1963). It is the Plaintiff's case that as per the agreement entered into with different flat purchasers, defendant Nos. 1 and 2 had provided separate recreation ground (RG) and garden for Plaintiff-Society. Similarly, a separate exclusive R.G. and garden was to be provided to defendant Nos.4 and 5 societies. The Plaintiffs were provided R.G. No.4 and 5. It is only with this intention of having separate recreation ground and garden, the wall admeasuring about 166 ft. in length and 7 ft. in hight was constructed between boundary of

Plaintiff-society and defendant No.4 Society which is known as Safalya Co-operative Housing Society. It is alleged by the Plaintiff that the defendant Nos.3 and 4 in collusion with Nos.1 & 2 decided to demolish the suit wall mentioned above and the MCGB, therefore, issued notice to Plaintiff-Society and the defendant Nos.1 and 2, calling upon them to demolish the said wall. In pursuance of the same, the defendant started demolishing the wall and the members of the defendant No.4 society entering and using the garden which is in front of Plaintiff-Society. Hence, Plaintiffs filed the present suit and prayed for mandatory injunction directing defendant Nos.1 and 2 to comply the provisions of MOFA and restore the compound wall i.e. suit wall in between Plaintiff-society and defendant No.4 Society. The Plaintiff also prayed for permanent injunction restraining the defendant No.3 MCGB from acting on the basis of notice issued to defendants for demolition of the wall. The Plaintiff-society also filed Notice of Motion and prayed for temporary injunction restraining defendant No.3 from demolishing the suit wall in pursuance of the notice issued by them on 27/04/2006 till the disposal of the suit. They also

prayed for temporary injunction directing the defendant to restore the the suit wall mentioned above.

4. The defendant No.1 filed their Written Statement and submitted that he has taken the entire land for development and defendant No.2 has permitted to utilize the FSI of 68,408 sq.ft. on the terms and conditions of the agreement dated 30/05/2000. They also denied that they demolished the suit wall unauthorizedly or illegally.

5. The defendant No.3 MCGB in their affidavit in reply contended that the construction of the suit wall is amounting to sub-division of sector No.6 which is not permitted by the Corporation. Besides this, if such wall is allowed to remain it would cause imbalance of FSI with respect to the building approved and the marginal open space will be reduced. They, therefore, contended that notice issued by them is legal and correct.

6. The defendant No.4 filed affidavit in reply to the Notice of Motion and contended that the recreation

ground shown in the approved plan are common to all buildings. The defendant No.1 is maintaining recreation ground on the basis of amount paid by all the flat purchasers in all the buildings. The recreation grounds and garden are meant for common use for all the flat purchasers of defendant No.4 Society as well as Plaintiff-society. They denied the Plaintiff's allegation that the garden which is in between Plaintiff-society and defendant No.1-society is exclusively meant for Plaintiff. Hence, on all these grounds, the defendant No.4 prayed for the dismissal of the Notice of Motion.

7. After hearing the arguments of the learned Advocates on both the sides and considering the documents produced on record, the learned Trial Judge came to the conclusion that there is possibility of developer utilizing additional FSI after demolition of the suit wall and it is, therefore, necessary to maintain statusquo in respect of the suit wall which was already in existence on the date of filing of the suit. He further observed that Plaintiff-society has failed to prove that garden which is in between

Plaintiff-society and defendant No.4-society is exclusively meant for Plaintiff-society. According to him, even the members of the defendant No.4 Society are entitled to enjoy the said facility of garden provided they have access by regular way other than demolishing the walls or fencing, till the disposal of the suit. He, therefore, directed defendant No.3 to maintain statusquo in respect of the suit wall.

8. Being aggrieved by the observations made by the learned Trial Judge that members of the defendant No.4 society i.e. Safalya Co-operative society are entitled to enjoy the facility of garden provided they have access by regular way otherwise demolishing the wall, Plaintiff has filed the present appeal.

9. In this appeal before me, Shri Dhakephalkar, learned Senior Advocate for the Appellant-original Plaintiff has urged only two points. Firstly, he submitted that once the trial Court had reached to the conclusion that the suit wall in question can not be demolished then there was no need for the trial Court to observe that the flat purchasers of Safalya Co-

operative Society can use the garden facility provided they have access by regular way. According to him, there was no question as to whether the said members are having right of access by regular way. Secondly, he canvassed before me that the Plaintiff has made out a prima facie case. If temporary injunction restraining members of Safalya Co-operative Society from using garden till the disposal of the suit is not granted then it would cause great inconvenience and hardship to Plaintiff and that would create further problems of maintenance and security of the Plaintiff-society as well as garden in question. He, therefore, submitted that the appeal be allowed and the members of the defendant No.4 society be restrained from using the garden in question till the disposal of the suit. As against this, it was argued on behalf of defendants that as per the initial development plan recreation grounds shown in the map are common to all buildings. Plaintiff's case that garden in question is exclusively meant for Plaintiff is not at all supported by any document and as such the order passed by the learned Trail Judge is legal and correct.

10. It is not in dispute that the defendant No.1 took large area of land for development and then there was an agreement between defendant Nos.1 and 2 whereby defendant No.2 was permitted to carry on construction and entered into an agreements with various flat purchasers. If we see the agreements entered into between the purchasers of flat of Plaintiff-society by the defendant No.2 then it is very clear that it is nowhere specifically mentioned in the said agreements that the garden in question is to be used exclusively by the members of the Plaintiff-society. Admittedly, though different societies for different buildings have agreed to be formed, it is also very clear that after the formation of the said societies one apex body of all these societies, which can called as federal body, is to be formed. So, in a way all the three societies are governed by the common rules. In fact, if we see the plans which are annexed at Exh-B and C then also it is very clear that there is nothing to indicate that the recreation ground or garden which is in front of Plaintiff-society is exclusively meant for Plaintiff-society. On the contrary, if we see the agreement entered into with flat purchasers of Plaintiff No.4

Society by the defendant No.4 and in particular clause-23(V), it is mentioned :-

> ***"Purchaser shall have the right in common, to use the garden and other common facilities that are formed part or portion of 15% R.G. (recreation ground) as per final lay out of sector-VI as may be approved by MCGM and after entire construction and development of the said sector-6 is complete."***

11. Besides this, in clause-22 details of amount to be paid by purchaser to developer are mentioned wherein clause-G and H are as under :-

"g)Rs.8,070/-	***Towards as Apex Body deposit for repairs, upkeep and maintenance of infrastructure facilities within the layout of the complex of Buildings on the said Sector VI such as internal road, street lights, gardens, Physical R.G.etc.***
h)Rs.12,105/-	***Towards as Apex Society Deposit for repairs, unkeep and maintenance of infrastructure facilities within the layout of the said Larger Property popularly known as "Panchasheel Enclave" such as roads, street lights, gardens, etc."***

From the above mentioned details of payment it

is clear that evenif RG or garden are in particular society but the same are under the control of the Apex body thereby suggesting that the same are common. Merely because in Clause-3 it is mentioned that the open space including part portion of 15% R.G. in common for sector-6 around the said wing A and B of said building Safalya is shown bounded by red colour on the plans annexed thereto and marked as annexture-II and it is hereby agreed by and between the parties that the said open space shall be exclusively in occupation and management of the society of the flat purchasers of the said 'A' and 'B' wing of the said building Safalya, we can not jump to the conclusion that garden which is in between two societies is exclusively of Plaintiff-society. In the clause-3 mentioned above there is absolutely no reference with regard to garden. So, in order to negate the contention of defendant No.4 one can not rely on the above clause at this stage. So, from the agreements in question and the plans prima facie learned Trial Judge has rightly held that Plaintiff has failed to prove that the garden in question is exclusively meant for plaintiff-society.

12. Plaintiff has produced on record certain photographs. From the photograph which is at Exh-236 which bear No.02:04:35 dated 18/07/2007 it clearly appears that there are two regular steps constructed near the said compound wall which is in between Plaintiff-society and defendant No.4 society. This in fact goes to show that not only on the date of filing of the suit but even thereafter and as on today the steps are in existence and thereby it is clear that way is provided for going from compound of defendant No.4 Society to the garden in question. We can not ignore the fact that defendant Nos.1 and 2 who are the builder and developer, they have also supported the case of defendant No.4 that the garden in question is not exclusively meant for Plaintiff No.4 Society. No doubt it may happen that the developer and builder may play mischief and while entering into an agreement with the flat purchasers of Plaintiff-society represent them that garden in question is meant exclusively for them and at the same time represent the members of the defendant No.4 society that garden is common. However, at this stage of temporary injunction we have to take into consideration all the facts and circumstances and

the position that was existing on the date of the suit. So, considering all these aspects it can not be said that the finding of the learned Trial Judge that the Plaintiff has prima facie failed to show that the garden in question is exclusively meant for Plaintiff is illegal, arbitrary and capricious. When such is the position, there is no need to interfere with the order passed by the learned Trial Judge.

13. In this view of the matter, there is no substance in this appeal. Hence, I pass the following order :-

O R D E R

Appeal is dismissed.

The Court is however directed to dispose of the suit as expeditiously as possible and in any event within one year from today.

Under the circumstance of the case, parties to bear their own costs of this appeal.

(S.R.SATHE,J.)